

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 07-10887 (KG) and
EXAERIS, INC., et al.,	)	Case No. 07-10888 (KG)
	)	(Jointly Administered)
Debtors.	)	
_____	)	

**CHAPTER 11 TRUSTEE OF INYX USA, LTD.'S COUNTER-DESIGNATION  
OF RECORD AND COUNTER-STATEMENT OF ISSUES WITH RESPECT  
TO APPELLANT DR. JACK KACHKAR'S APPEAL OF FINAL  
POSTPETITION FINANCING ORDER ENTERED BY THE BANKRUPTCY  
COURT ON SEPTEMBER 27, 2007 (DOCKET NO. 179)**

Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, Stephen S. Gray, the Chapter 11 Trustee (the "Trustee") of the Debtor, Inyx USA, Ltd. (the "Debtor") submits this counter-statement of the issues on appeal and counter-designation of additional items to be included on the record on appeal in connection with the appeal filed by Jack Kachkar ("Kachkar") from an order of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), dated September 7, 2007, titled "Final Order as to Debtor Inyx USA, Ltd. (Case No. 07-10888) (I) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Westernbank Puerto Rico as the Prepetition Lender, (III) Authorizing Postpetition Financing, (IV) Granting Liens and Superpriority Administrative Expense Status Pursuant to 11 U.S.C. §§ 363 and 364, and (V) Modifying Automatic Stay Pursuant to 11 U.S.C. § 362" (Docket No. 179) (the "Westernbank Final DIP Order") and, the credit extended thereby, the "Westernbank Financing"), and respectfully submits:

**COUNTER-STATEMENT OF ISSUES ON APPEAL**

1. Is Kachkar's appeal from the Westernbank Final DIP Order moot pursuant to section 364(e) of the Bankruptcy Code because the Bankruptcy Court found that Westernbank extended the Westernbank Financing in good faith to the Debtor, which Kachkar's counsel acknowledged, admitted and agreed to at the August 23, 2007 hearing on the Westernbank Financing.<sup>1</sup>

2. Is Kachkar's appeal from the Westernbank Final DIP Order moot because the liens granted to Westernbank pursuant to the Westernbank Final DIP Order appealed from do not, contrary to Kachkar's assertions, prime any lien previously granted to Kachkar pursuant to the Interim Order dated July 11, 2007 (the "Kachkar Interim DIP Order") entered on the Kachkar financing (the "Kachkar DIP") in the procedurally consolidated chapter 11 cases.

3. Is the Bankruptcy Court's interpretation of its Kachkar Interim DIP Order clearly erroneous with respect to the extent of the liens granted to Kachkar by the Kachkar Interim DIP Order, on which interpretation depends the question of whether those liens were primed by the Westernbank Final DIP Order.

4. Are the Bankruptcy Court's specific findings that the Westernbank Financing was negotiated and extended in good faith and at arm's length between the Trustee and Westernbank, and for valid business purposes and uses, and hence that Westernbank is entitled to the protections and benefits of section 364(e) of the Bankruptcy Code, clearly erroneous.

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<sup>1</sup> Transcript of Bankruptcy Court Hearing held on August 23, 2007, page 11, lines 3-6.

**COUNTER-DESIGNATION OF RECORD**

The Trustee counter-designates the following items to be included in the record on appeal. Each designated item includes any exhibits to such item.

<b><u>Docket No.</u></b>	<b><u>Description</u></b>
17	Emergency Motion Of Westernbank Puerto Rico For Adequate Protection And To Prohibit Use Of Cash Collateral, dated July 9, 2007
26	Objection By Westernbank Puerto Rico To The Debtors' Motion: (I) To Authorize Secured Postpetition Financing; (II) To Grant A Super-Priority Administrative Claim And Postpetition Liens; And (III) To Schedule A Final Hearing, dated July 10, 2007
46	Order Granting Motion For Adequate Protection, dated July 12, 2007
74	Supplemental Objection Of Westernbank Puerto Rico To Debtors' Motion For Final Approval Of Secured Postpetition Financing And Related Relief, dated July 24, 2007
122	Order (SECOND INTERIM): (I) Authorizing Secured Postpetition Financing; (II) Granting a Super-Priority Administrative Claim and Postpetition Liens; and (III) Scheduling a Final Hearing, dated August 8, 2007
168	Order (THIRD INTERIM): (I) Authorizing Secured Postpetition Financing; (II) Granting a super-Priority Administrative Claim and Postpetition Liens; and (III) Scheduling a Final Hearing, dated September 6, 2007
195	Order (FOURTH INTERIM): (I) Authorizing Secured Postpetition Financing; (II) Granting a Super-Priority Administrative Claim and Postpetition Liens; and (III) Scheduling a Final Hearing, dated September 24, 2007
240	Transcript of Hearing held on September 7, 2007 before the Honorable Kevin Gross, dated October 9, 2007

Dated: October 9, 2007  
Wilmington, Delaware

PACHULSKI STANG ZIEHL & JONES LLP



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